UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL ADVOCATES, a non-profit corporation, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, a United States Government Agency, Defendant, and STATE OF OREGON; OREGON WATER QUALITY STANDARDS GROUP; THE FRESHWATER TRUST Intervenors-Defendants.	Civil No.: 3:12-cv-01751-AC **DECLARATION OF DANIEL D. OPALSKI IN SUPPORT OF EPA'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON REMEDY**

I, Daniel D. Opalski, based on my personal knowledge, state:

1. I am the Director of the Office of Water and Watersheds for Region 10 of the U.S. Environmental Protection Agency ("EPA" or "Agency"). I have been in this position since October 2012. I have worked at EPA for approximately 31 years. Prior to my current position I was Director of Region 10's Office of Environmental Cleanup for approximately 8 years, and I served as Director of Region 10's Oregon Operations Office for 5 years prior to that. In my current position, I lead an office of approximately 70 staff and managers who directly implement and/or

oversee implementation by states and tribes of the majority of the federal Clean Water Act (CWA) programs and federal Safe Drinking Water Act programs across the states of Alaska, Idaho, Oregon and Washington.

A. EPA's Obligations Related to Total Maximum Daily Load Development and Implementation

2. The matters addressed in this lawsuit are matters handled by the Watershed Unit within my office. The Watershed Unit has 10 full-time staff. Their responsibilities include overseeing implementation of the Total Maximum Daily Load (TMDL) programs in the Region 10 states of Alaska, Idaho, Oregon, and Washington. This oversight involves review and approval or disapproval of TMDLs submitted by the states. Our oversight responsibility also includes review and either approval or disapproval of lists of impaired waters (called 303(d) lists) from each state every other year and providing grant and oversight support to the Region 10 jurisdictions' non-point source programs that help achieve TMDL-identified pollutant reductions from non-point sources under CWA section 319. We are also responsible for overseeing implementation of the Coastal Zone Management Act in Oregon and Washington. In addition, the Watershed Unit oversees implementation of CWA section 106 and CWA section 319 programs for eligible tribes in the Region.

3. In addition to programmatic responsibilities arising directly from the Clean Water Act, the Watershed Unit has responsibilities arising out of TMDL and other litigation involving the Region 10 states. EPA Region 10 has state-wide TMDL obligations "backstopping" state completion of required numbers of TMDLs pursuant to a settlement agreement in Washington and pursuant to a court order in Alaska. In addition to these "backstop" obligations the Region has a number of litigation-related commitments. The Watershed Unit is already supporting the Oregon Department of Environmental Quality (ODEQ) as it works to develop the Klamath River Temperature TMDL and Willamette Mercury TMDL, in accord with the Court's order in this case.

These two TMDLs alone will consume several hundreds of thousands of dollars in contractor resources provided by EPA Headquarters. Because of ongoing litigation and previous commitments, EPA Region 10 is preparing a temperature TMDL for the Columbia and Lower Snake Rivers. This TMDL requires EPA to work with Idaho, Oregon, Washington, and affected Tribes in the development of a very large geographic scale TMDL (including Oregon waters impaired for temperature).

4. The Watershed Unit is required to perform all of the activities described in the above two paragraphs, either by the Clean Water Act or by Court Orders, Consent Decrees, or Settlement Agreements stemming from previous litigation. My office has no discretion to abandon or deprioritize any of these activities. Region 10 also has several unresolved cases in litigation representing large potential TMDL obligations regarding PCB impairments in the Spokane River, Washington (WA), turbidity impairments in the Hangman Creek (WA), and multi-pollutant impairments in the Deschutes River (WA).

5. The Clean Water Act envisions that states will develop, issue, and implement TMDLs, with EPA providing funding and support for development and approval or disapproval of submitted TMDLs. Working relationships, roles, and responsibilities between EPA and its state partners are documented in Performance Partnership Agreements (PPAs). In the PPA[1] between EPA and ODEQ, the parties commit to working together on jointly established goals for state-delegated Clean Water Act programs. The PPA includes a list of several "priority" TMDLs to be developed, most of which require EPA funding and technical support, as well as specific outcomes expected from EPA program funds awarded to the state. Discussions on priority order of TMDLs include aspects such as how long the waterbody has been impaired, the degree to which impairment

[1] The 2016-2018 PPA can be found at http://www.oregon.gov/deq/about-us/Pages/ppa.aspx with other information on PPA commitments.

is preventing a designated use from being attained, what other pollutants are causing or contributing to impairments for that waterbody, and when the point source permits in that waterbody are up for reissuance. The PPA is revised biannually and the completion of "priority" TMDLs are also reported nationally as part of the measures developed by EPA and the States in 2013.[2] [See Declaration of Eugene Foster.]

B. Development of Replacement Temperature TMDLs

6. The process of developing a TMDL, whether by a State or by EPA, is complex and time-consuming. First, the agency generally conducts monitoring for each of the pollutants addressed by the TMDL. In Oregon, modeling is used in the preparation of nearly all TMDLs to identify critical conditions, assess source contributions, and quantify the potential impacts of treatment and/or restoration measures. For each TMDL, the model must be updated with current site-specific information and calibrated to ensure its predictive value. Load allocations and wasteload allocations are then assigned. The TMDLs must include reasonable assurances that the load allocations will be met and provide for a margin of safety to account for a lack of information. EPA does not have the authority to issue or approve implementation plans, but Oregon develops implementation plans (Water Quality Management Plans) for all of its TMDLs, as required under its own state regulations.[3] The WQMP, along with the Designated Management Agency's TMDL Implementation Plans that are also required by the state's regulation, provide much greater specificity than the TMDL about how load allocations may be achieved. From the point at which

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[2] These measures are described in the EPA document "A Long-Term Vision for Assessment, Restoration and Protection under the Clean Water Act Section 303(d) Program." The most recent guidance for the National Water Program for FY18-FY19 refers to these reporting measures (https://www.epa.gov/sites/production/files/2017-09/documents/fy18-19-ow-npm-guidance.pdf).

[3] OAR 340-042-0040(3)(l) Establishing Total Maximum Daily Loads (TMDLs) and OAR 340-042-0080 Implementing a Total Maximum Daily Load.

monitoring and data gathering begins, it is not uncommon for the development of a TMDL to take three to five years.

7. In general, EPA provides technical, policy, and contractor support to the state in the development of complex or highly visible TMDLs. Senior EPA regional staff are assigned to work with ODEQ's TMDL lead staff, participating in regular meetings and conference calls at all stages of TMDL development. EPA attempts to anticipate any policy or technical issues that may affect the approval process and will confer regularly with ODEQ to address these issues. When contractor support is provided, usually for modeling or data analysis, EPA staff must direct the federal contractor's work. EPA carefully reviews draft TMDLs and provides official comments on the TMDL during Oregon's public comment process. When Oregon submits the TMDL to EPA for review and approval or disapproval, EPA staff reviews the TMDL, including the comment-response document. If staff recommends that the TMDL be approved, the staff must prepare an approval memorandum for the record and an official approval letter for signature by the Office Director. Following the issuance of the approval letter, EPA staff assembles the administrative record that provides the basis for approval of the TMDL.

8. In order to replace the existing Oregon temperature TMDLs, both EPA and ODEQ intend that the working arrangement described above will be followed for development of any replacement temperature TMDLs. We have conferred with ODEQ on the mechanics and proposed schedule for replacement, as described in the Declaration of Eugene Foster. We believe that the proposed schedule of twelve years is a reasonable schedule, given the work involved and the competing priorities for both agencies.

C. Challenges in Replacing the Temperature TMDLs

9. EPA recognizes when the TMDLs are replaced, the replacements must be legally sound. Since the February 2012 ruling from Judge Acosta on Oregon Water Quality Standards and

since NWEA's subsequent lawsuit on temperature TMDLs filed in September 2012, EPA and ODEQ have invested hundreds of hours on investigating, describing, and evaluating a variety of approaches for addressing the program impacts in water quality standards, TMDLs, and permits, as a direct result of the invalidation of the natural conditions criteria (NCC). These efforts have highlighted that replacing the TMDLs is a tremendous effort with no commensurate environmental benefit.

10. The most legally and technically sound approaches to addressing the TMDL defects stemming from the invalidation of the NCC are also the most resource-intensive. The TMDLs at issue identify waters that are naturally warmer than the applicable BBNC at times, which creates significant challenges to the use of the BBNC as the applicable standard. This circumstance could be addressed by development of site-specific criteria (SSC) for these waters. Such SSCs would require additional modeling to identify criteria that are representative of natural conditions and that include the complex array of natural variation that supports the uses. Prior to taking final action on the SSC, EPA would have to consult with National Oceanic and Atmospheric Administration (NOAA) and U.S. Fish and Wildlife Service (USFWS) on the potential effects of the action on listed species and their critical habitat areas pursuant to Section 7 of the Endangered Species Act. The time and effort to prepare, consult on, promulgate, and approve these SSCs by EPA, ODEQ, NOAA, and USFWS would be considerable. But in the end, as described in the Declarations of John Palmer, Jennifer Wu, and Ben Cope, new TMDLs based on these SSCs would limit the cumulative anthropogenic contribution of heat to the human use allowance (HUA) of 0.3 degrees Celsius, divided among all contributing point and nonpoint sources, and employ surrogate measures, such as shade targets for full natural vegetation, and other features that cool streams, the same actions called for in the existing TMDLs. In short, replacing the NCC with new SSCs and basing new TMDLs on those new criteria would result in TMDLs that look very much like the ones being

replaced. Other standards options could include development of new state-wide water quality standards. Doing so would involve many of the same procedural and regulatory steps of the SSC approach, but with some economies from fewer individual actions. And again, a new standard would not result in any appreciable differences in the load or wasteload allocations in the TMDLs. Those would still be determined by the HUA and surrogate measures calling for full restoration of natural conditions.

11. The Oregon temperature TMDLs affected by the invalidation of the NCC should be replaced eventually, as part of the regular application of the Clean Water Act's processes. EPA has already taken the step of proposing to add the waters affected by the invalidation of the NCC to Oregon's 2012 303(d) list of impaired waters.[4] EPA has proposed to add these waters to Category 5. This category identifies impaired waters for which a TMDL is necessary. Placement of these waters in Category 5 of the 303(d) list will identify them as requiring new or revised TMDLs without invalidating the existing TMDLs. It will not prioritize them above other waters in Category 5, but will preserve ODEQ's ability to make decisions about the priority order for their completion while allowing implementation of existing TMDLs to continue.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 16th day of February 2018.

Daniel D. Opalski

[4] EPA's proposed action on Oregon's 2012 303(d) list can be found at https://www.epa.gov/tmdl/partial-approval-and-partial-disapproval-oregon-2012-303d-list, including a list of the waters proposed to be added.